

**WRITTEN STATEMENT OF JANE M. POLLACK  
BEFORE THE UNITED STATES SENATE  
SPECIAL COMMITTEE ON AGING**

FEBRUARY 11, 2003

Good morning, Honorable Senators. Thank you for the opportunity to appear before this committee. I come here to testify today, in the midst of many trials and tribulations, with the hope that no other family will have to endure the nightmare that we did on behalf of my elderly aunt, Mollie Orshansky.

**WHO IS MOLLIE ORSHANSKY?**

Mollie Orshansky is a national treasure. My Aunt Mollie is renowned in the areas of statistics and economics. She is best known for her genius in envisioning and developing the federal poverty line formula in 1963, which has enabled millions of the nation's poor to obtain the benefits and the means to sustain themselves and their families. Her own roots in a poor immigrant family served as the inspiration for her efforts. Mollie has been sought out and mentioned by other authors and by Members of Congress. She has appeared on Meet the Press and been interviewed on National Public Radio. Most recently, Mollie and the poverty line were a subject of the television program, The West Wing. During her outstanding 46-year public service career, Aunt Mollie was the recipient of many prizes and honors, including the Distinguished Service Award, in 1976, the highest honor bestowed by what was then known as the Department of Health, Education and Welfare. After retirement, she continued in public service. She served on the Board of the United Seniors Health Cooperative, in order to protect the elderly. However, Mollie has said that her proudest accomplishment was her testimony in 1964, at the request of the Department of Justice, which helped to end the Poll Tax. She showed that a poor family would have to choose between eating and exercising their right to vote.

Mollie was always very strong-willed and fiercely independent. However, Aunt Mollie was a devoted, loving and affectionate sister and aunt, with a special fondness for children.

**MOLLIE'S PRECAUTIONS**

Aunt Mollie did everything possible to plan for her future. She executed a Health Care Proxy, naming me as her agent. She also established a trust in 1981, which held all of her assets. Aunt Mollie designated her sister Rose as co-trustee, so that her money and assets could be used and administered on her behalf, in the event of incapacity. She purchased an apartment in the same building as Aunt Rose, which is also four blocks from her sister Sarah, my mother, and near her nieces. Aunt Mollie planned to move there when the time was right. This planning was to ensure that she would be able to live at home, near her family, in the event of poor health or diminished capacity. It was designed to let her family, not strangers, care for her and make the necessary health and financial decisions should she be unable to do so.

Aunt Mollie took the recommended steps to plan for her future but she never anticipated that a hospital, court and lawyers could or would overturn all of her carefully made plans.

## **MOLLIE'S DECLINE**

Aunt Mollie's decline began gradually, in mid-2000. The family noticed she was having difficulty keeping track of her mail and paying bills on time, and we intervened. During frequent visits, family members noticed some decline in her personal care, and her apartment was no longer neat and organized. Despite this, Mollie stubbornly refused live-in or part-time assistance, and she did not feel the time was right to move to her apartment in New York City.

Because of her sometimes-disheveled appearance, and rambling conversations, her building management contacted Adult Protective Services. The caseworker told the family that she would be making arrangements for homecare, but this fell through and she failed to notify us. One day, without notifying the family, the caseworker ordered an ambulance and took Mollie, against her will, to the hospital. Although the caseworker and the hospital were aware that Mollie had interested family, the hospital instituted guardianship proceedings.

Upon finally being notified of Aunt Mollie's hospitalization, the family took action to honor her wishes. We prepared her apartment and hired experienced 24-hour homecare, in anticipation of Mollie's arrival. As her health care agent, I arrived in Washington a few days later and presented the proxy. I found Aunt Mollie sitting in the dark, forlornly staring into space, with a large contusion on her forehead, due to a fall in the hospital. She was in four-point restraints. Her hands and feet were strapped to her chair and a sheet wrapped around her waist tied her body to the chair. Her speech was slurred. She was disoriented, confused, and obviously traumatized. I was told that she had to be restrained and was heavily medicated because she did not want to be in the hospital and kept making a fuss and trying to leave for home.

My requests to obtain Mollie's release into my care as her health care agent were denied because of the pending guardianship hearing. I was informed that she was not there for medical reasons, but for custodial reasons, until her scheduled hearing, seven weeks hence. I was also told that they were waiting for an opening in a nursing home, which was against Mollie's specific wishes and arrangements.

I informed the administrator and the social workers of Mollie's wishes, her carefully made plans and her financial arrangements. However, although the Health Care Proxy gave me legal authority to direct that Mollie be released to me and Aunt Mollie had certainly not committed any crime, her discharge was denied and she was held against her will, a prisoner in the hospital. During my visits she often said, "I didn't know they could do this to me. I can't live like this."

## **MOLLIE'S INCARCERATION AND ESCAPE**

Each day of her incarceration in the hospital compromised Mollie's health. A hospital is an unsafe place to stay for a person who is not ill. Aunt Mollie's risk for infection, disease and illness greatly increased and I had to plead for routine healthcare and vaccinations for the flu and pneumonia (refused). She received little attention. Mollie's physical and mental condition deteriorated. She fell twice, developed a bedsore, sustained two urinary tract infections, her appetite suffered and she became dehydrated. Mollie was forced into incontinence. Her muscles atrophied and she could no longer

stand or walk. In addition, when I was not there, Aunt Mollie was deprived of mental stimulation and social interaction.

Mollie's rights were being trampled and her health was put dangerously at risk, each moment she remained captive in the hospital. Despite the repeated refusal of the hospital to officially release Aunt Mollie to me, I relied upon my legal authority as her health care agent to remove her. On the eve of Martin Luther King Day, at 7:40 PM, I rescued Aunt Mollie. With a lump in my throat and my heart pounding furiously, I wheeled Mollie out of her room, past the nurse's station to the elevator and down to lobby. I avoided the security desk and prayed the guard would not notice. I took Mollie to a side exit and pushed the door open. Aunt Mollie was free at last. At 10:15 PM I called the nurse's station to advise them that Mollie was all right and they need not worry. However, 2 1/2 hours after Mollie left the hospital, they had not even realized that she was gone.

### **PRESSURE TO RETURN**

I was fearful of how the D.C. court would react – and my fears were justified. I retained New York and D.C. counsel. The D.C. court was advised that I would commence a guardianship proceeding in New York, so it could be assured of Mollie's continued well-being. However, before my attorneys could file the guardianship petition in New York, the court appointed attorney initiated an emergency hearing.

There, he persuaded the judge to switch his role to Mollie's temporary guardian, telling her there was a large pension and a sizeable account at a brokerage firm. The judge then replaced him as "Mollie's attorney". The court voided Mollie's Health Care Proxy and froze her account. This caused her bill payments to bounce. The judge also ordered the temporary guardian to enlist the New York City Police to have Aunt Mollie immediately returned to Washington D.C.

Our whole family was petrified that Mollie would be kidnapped and brought back to Washington. We lived in fear that Police Officers would storm into Aunt Mollie's apartment and drag her away. We dreaded her fate upon return, of loneliness, isolation and exile from her family.

Fortunately, we were able to obtain an order from the New York court prohibiting Aunt Mollie's removal from the jurisdiction. However, for several very tense days, we were still so fearful that the temporary guardian and the police would arrive at Mollie's door to drag her away, that our lawyer was on-call 24 hours a day to run to Aunt Mollie's apartment with the court order in hand.

### **THE COURT CASE**

I testified regarding Mollie's wishes and carefully made plans and told of the excellent medical and personal care Mollie was receiving at home in New York. However, I lost my counter-bid for guardian/conservator at the February hearing in D.C. Her temporary guardian, a stranger, was appointed as her permanent guardian/conservator and put in charge of Mollie's trust. Not only did Aunt Mollie's court appointed attorney fail to provide her with zealous representation, she failed to represent Mollie at all. Instead, she chose to represent the guardian and supported the court in voiding Aunt Mollie's Health Care Proxy and replacing Aunt Mollie with the guardian as co-trustee of her own

trust. Incredibly, "Mollie's attorney" has never met with her or even spoken to her on the phone. She never advised Mollie of the hearing or the results, never told Mollie she could appeal and, in fact, fought the appeal in Mollie's name. Her court appointed guardian/conservator has done nothing for her. I, in essence, acted as the guardian and provided and supervised for all of Mollie's care. Her sister Rose, in essence, acted as the conservator, paying Mollie's bills from the trust. However, the guardian/conservator diverted money from Aunt Mollie's trust and has run up astronomical fees, without benefiting her. In addition, the guardian/conservator and the attorney have hectorred and harassed the family.

Fortunately, in August, the appeals court vacated all of the decisions of the lower court, and charged the judge with abuse of discretion. The judge's decision was so egregious and filled with folderol, that the appeals court overturned every aspect of it in a fifty-page decision.

However, this is not over. A judge still must decide whether to dismiss the case and whether to grant requests for reimbursement of expenses and legal fees from the D.C. guardianship fund or from Mollie, as her "attorney" advocates in her name. This means that Mollie would pay for the errors of the court, despite her "attorney" previously stating that there would be no irreparable harm. Our family (including Mollie) has, so far, incurred over \$160,000 in expenses and bills. This includes almost \$50,000 claimed by the guardian for "services" rendered, over \$18,000 for the colleague he hired to fight the appeal, over \$6,000 already paid to the guardian as Mollie's original court-appointed lawyer, about \$13,000 already paid in guardianship administrative expenses and my legal fees for Mollie's rescue, which are at least \$75,000, covering Washington and New York. And the costs are still mounting. That's just the money. The emotional and physical toll is incalculable.

## **CONCLUSION**

My grandparents emigrated from Russia, where they faced poverty and persecution. They truly believed the words of the Declaration of Independence that all people have the "inalienable rights to life, liberty and the pursuit of happiness." Last year, on his trip to China, President Bush declared that, "All the world's people...should be free to choose how they live ...worship...and how they work." My grandparents would feel much deceived and dismayed by the trampling of Mollie's rights and disregard of her wishes and carefully made plans. How ironic that this would happen to someone who devoted most of her life to assisting the helpless.

If you live long enough, infirmity will eventually catch up with you. It is ludicrous to think that any hard working American would want strangers to appropriate their savings or make decisions about their personal care. I am hopeful that Congress will enact legislation to guarantee that the wishes of seniors and their families are respected, so that no other family will suffer the travails that our family did.

Thank you.

Appendixes A – H follow.

## **APPENDIX A: Mollie's Wishes and Plans, should she need help**

Mollie Orshansky had thoughtfully and carefully made plans and legal arrangements for the eventuality that she might need significant help. She never wanted to be a burden on her family, but she did want the same hands-on loving treatment and management of her care as she and others had provided for some of her sisters in the past, when they became severely and even terminally ill.

### **Wishes regarding financial affairs:**

1. To protect her financial assets, property and personal possessions from encroachment by strangers.
2. To give access and authority to manage her assets and pay her bills, to a trusted family member.

### **Arrangements:**

1. Created a Revocable Trust naming her sister as Co-Trustee and another sister as successor Co-Trustee.
2. Opened a Trust account at a brokerage firm, with full checking privileges.
3. Transferred her assets into her Trust.
4. Upon retirement in 1982, arranged for direct-deposit of her monthly pension into the Trust account.

### **Wish regarding where she would reside and receive care:**

To change her domicile to her New York apartment in close proximity to her family, for her comfort, happiness and ease of mind and for their convenience to visit frequently and act as her caregivers or direct her care.

### **Arrangements:**

1. Purchased cooperative apartment in 1988 in same building as her sister, in New York.
2. Furnished the New York City apartment and kept it ready for occupancy by her and an aide, at a moment's notice.
3. Never rented out the apartment, to ensure it was available.

### **Wish regarding personal care and medical decisions:**

To have personal care arrangements and health-related decisions made in accordance with her wishes, by a trusted relative, in the event she could not make them herself.

### **Arrangements:**

Anticipated that her wishes and arrangements with regard to change of domicile to New York would be honored.

1. Signed a New York State Health Care Proxy (NY's equivalent of a Durable Power of Attorney for Health Care) in July, 2000 and asked her niece, who lives in New York and had recently helped her, to be her Health Care Agent.
2. Signed a New York State Living Will.

## **APPENDIX B: Help Provided by Mollie's Family**

**Starting well over a year before APS became involved, members of Mollie's family, all of whom live hundreds of miles away and have other responsibilities, such as full-time jobs and other family members they are providing care for, had gone out of their way to help her on an ongoing basis and were actively continuing to try to implement homecare.**

- Mollie's various delinquent bills and taxes were painstakingly researched and arrangements were made to bring them up to date and keep them current.
- With great effort, like pulling teeth, she was taken to the doctor for checkups in mid-2000 and again in 2001, just a few weeks before APS claimed she was malnourished, dehydrated and weak. (The doctor had not found any of these conditions.)
- Podiatrists, eye doctors and eyeglass stores in DC were researched and attempts were made several times to take her, but to no avail.
- In addition to frequent lengthy phone calls to check on her, and periodic calls to building staff to obtain their opinion about her status, relatives took off extended periods from work (weeks at a time) and made several trips to Washington, DC to see Mollie first-hand and assist her.
- Cash and items of clothing were sent and brought to her. Arrangements were worked out with the supermarket management to deliver groceries and let her buy on credit as contingency plans, in case of bad weather or if she misplaced her credit card or cash.
- Homecare agencies and individuals working as home aides were researched. Ladies were even hired and brought to Mollie's apartment under the ruse that Mollie would be helping them out by giving them a job, and that they were college girls who could benefit from her knowledge, but she would not let them in. Despite this, research into agencies and care managers continued (until APS stated on November 29, 2001 that they had gotten Mollie to agree to a homemaker for 12 hours a day and they would be making the arrangements, thus solving the problem).

Emotional, physical and financial management assistance was provided and family members greatly extended themselves. We did not just stand by. We tried our best and never gave up. (We were also determined to rescue her and obviously persisted in that, as well, and succeeded, although at unimaginably great personal sacrifice.)

**We had felt great concern over Mollie's gradually deteriorating condition and her refusal to acknowledge it and agree to accept even some form of minimal help that would have sufficed to enable her to continue living somewhat independently and maintaining her routine. We were very frustrated and knew that eventually the issue would have to be forced, but Mollie was clinging to her independence and was still, although just barely, "managing" in her own routine, going to her supermarket, eating, and**

spending her days as she wished. The dilemma we faced was that there was no way of forcing Mollie to accept help without literally having to tie her up, dope her and ruin her life.

## APPENDIX C: The Human Toll, on Mollie, of the “Intervention”

### The devastating impact on Mollie Orshansky:

She was severely traumatized by her forced incarceration, held down with “4-point restraints” with both wrists and both legs tied to the corners of the bed, and doped into submissiveness and oblivion by being pumped full of heavy sedation (a combination of Haldol and Ativan) so strong that she was given oxygen “as a matter of protocol,” due to the danger of respiratory depression. Permanent mental, emotional and physical harm was sustained.

#### • Mental, Emotional and Social Impact

1. **Precipitous irreversible decline in mental state; severe progression of dementia.**
2. **Suffered depression** from traumatization and from sense of loss of identity as an independent person in control; felt that her rights and her Trust were taken away from her and all her assets were gone. Now recovered from depression and happy to be in close contact with family, but says, “I used to have money. Now it’s gone.”
3. **Her way of life is gone.** Could this have been avoided? We’ll never know.

#### • Physical Impact

1. Rendered **permanently incontinent** due to restraints; catheterized, then diapered; not allowed to go to toilet.
2. **Permanently wheelchair-bound**, despite 2 rounds of physical therapy.
3. Suffered 2 falls including a head injury, 2 severe urinary tract infections requiring intravenous antibiotics, and a bed sore on heel from neglect during forced imprisonment in hospital; lost weight due to depression and foreign environment in hospital; recovered from these injuries, infections and effects soon after rescue.

#### • Financial Impact

A Conservator is supposedly appointed to prevent waste and dissipation of assets. Quite the opposite happened here.

1. **Monthly pension payments** had been the primary source of funding and income to the Trust, from which all bills are paid. These **were diverted from the Trust to a non-Trust “fiduciary” account** under the sole control of the Guardian/Conservator, for 8 months until the family finally got this reversed after winning the Appeal.  
**Of the \$57,616 of pension diverted from the Trust, at least \$36,631 has been spent by the Guardian/Conservator.** Of this, the only worthwhile payments that normally would have been made anyway from the Trust, had there been no Guardianship, are \$176 for a handful of utility bills and \$250 to drill open the safe deposit box, which some day would have had to be done by the family. **Mollie Orshansky and her Trust may never recover the majority of the unnecessarily and wastefully spent funds.**
2. **\$75,000 was boldly wire-transferred out of the Trust account into the non-Trust “fiduciary” account** under the sole control of the Conservator. He has asked the Court to rule that **almost \$68,000 of this hoarded amount be paid to him and to his own lawyer** as fees for their “services,” even though the Guardian/Conservator’s appointments were reversed and vacated. **Mollie Orshansky and her Trust may never get any of this money back.**

## **APPENDIX D: The Human Toll on Mollie's Family**

### **A profound impact on niece Jane Pollack and other close family members:**

- **Emotional and Social Impact**

1. **Fear; unrelenting severe stress; constant utter frustration and exasperation** for over a year. **A seemingly never-ending nightmare.**
2. Several weeks of **time lost from job.**
3. **Disruption of normal family life.** No time for interaction. Loss of time that should be spent with child, husband and elderly mother. **Tremendous drain on time, to work on legal case.**

- **Physical Toll**

1. Unhealthy **stress.**
2. **Sleep deprivation and impairment** for over a year.
3. **Exhausting and draining.** Long hours (**probably about 2,000 hours**) spent by Jane and family in planning and participating in the hearings, researching and drafting points for the appeal, and responding and objecting to numerous seemingly never-ending reports, petitions for fees and untrue statements of the illegitimate Guardian.

- **Financial Burden**

Jane Pollack, in order to rescue her aunt and extricate her from deterioration in a dangerous and neglectful environment while involuntarily imprisoned in the hospital, and save her from the outrageous violation of her rights by greedy parties and an arrogant, abusive judge, courageously, yet with full authority of the law, removed her aunt from the hospital where she was held captive. In following her aunt's previously expressed wishes and plans, Jane brought her to New York. Because the DC Court insisted on continuing its Intervention Proceeding and illegitimately issued orders appointing a stranger as Guardian, Conservator, and Co-Trustee, voiding all valid and legitimate powers of attorney executed by Mollie Orshansky and mutilating her Trust agreement, **Jane Pollack filed suit in New York for Guardianship and had a restraining order issued that was of critical importance. She then participated in the DC case to attempt to get justice for her aunt. Failing that, she appealed the astoundingly erroneous, abusive and illegitimate decisions of the DC Superior Court. Her efforts paid off. The Appeal was won and all decisions of the Court were reversed. The appointments of the greedy stranger-Guardian/Conservator/Co-Trustee were voided. Mollie will be allowed to stay in her New York apartment and be cared for by her niece and family, as she had wanted.**

However, **all of this took money.** Neither Jane Pollack nor her family had any idea **just how much money** would be involved for legal fees. The astounding bill, with the meter still running, has exceeded **\$75,000 and can be expected to reach or exceed \$85,000** before the legal cases are over! Mollie Orshansky would never have wanted her relatives to be out even one cent on her behalf. She saved her money and managed it, and thought it was protected and would be sufficient to pay for all of her needs. **Mollie never anticipated** that there would be **any legal fees** involved in providing care for her, least of all that anyone else would pay them.

## **APPENDIX E: The Cost in Dollars**

### **CT.-APPOINTED ATTORNEY/GUARDIAN'S FEES AND PAYOUTS:**

<b>Original Court-Appointed Attorney's Fees</b>	<b>\$ 6,240</b>	
(had asked for \$7,800 for 31 hours of work "for services rendered")		
Note: Original Court-appointed Attorney asked Attorney for the Petitioner (a hospital) to file for an Emergency Hearing, the purpose of which was to appoint him as Temporary Guardian/Conservator and replace him as Mollie's Attorney. The Court-appointed Attorney claims Attorney for the hospital urged him to volunteer to be the Guardian.		
<b>Temporary, then Permanent Guardian/Conservator's Fees</b>	<b>\$ 49,102</b>	
(for claimed 256 hours of work "for services rendered"; primarily to prepare for/attend hearings to ask to be appointed Gdn./Consvtr., oppose DC Appeal, influence/attempt to dismiss NY case; divert monthly pension and Trust acct. funds to "fiduciary" acct., prepare Inventory, Gdn./Consvtr. reports and Accounting rept., and prepare/submit requests for his own fees)		
<b>Fees paid by Guardian to Law Firm he's "of counsel" to</b>	<b>\$ 638</b>	
<b>Guardian's filing, copying, phone, postage, process server</b>	<b>\$ 3,769</b>	
<b>Fees for Lawyer representing the Guardian</b>	<b>\$ 18,015</b>	
(for colleague hired to fight the Appeal and preserve appointments)		
<b>Second Court-Appointed Attorney's Fees</b>	<b>\$ ?</b>	not billed
(no bill, nor for 2 colleagues in DC and NY enlisted by her to fight the Appeal in DC and try to get NY case dismissed "on behalf of client Mollie Orshansky" without any of them ever contacting her)		
<b>Guardian's premium for surety bond</b>	<b>\$ 2,610</b>	
<b>Guardian's claimed expenses for property appraisals</b>	<b>\$ 1,754</b>	
<b>Wire transfer fees to siphon \$75,000 out of Trust account</b>	<b>\$ 93</b>	
<b>Guardian's alleged expense to clean 1-bedroom apartment</b>	<b>\$ 1,714</b>	
<b>Guardian's payment to CPA for tax prep. (family had done for free)</b>	<b>\$ 1,152</b>	
<b>Guardian's travel expenses</b>	<b>\$ 1,675</b>	
-----	-----	<b>\$86,762</b>
<u><b>NIECE'S LEGAL COST OF RESCUE:</b></u>		
<b>Fees for niece's attorney in DC through 12/20/02</b>	<b>\$ 39,180+</b>	
<b>Filing, copying, postage for niece's attorney in DC</b>	<b>\$ 1,410+</b>	
<b>Niece's travel to Court hearings in DC</b>	<b>\$ 400</b>	
<b>Fees for niece's attorney in NY through 1/3/03</b>	<b>\$ 34,208+</b>	
<b>+Probable additional fees for niece's DC and NY attorneys and Court costs to complete pending cases</b>	<b>\$ 10,000 (estim.)</b>	
	-----	<b>\$85,198</b>

**GRAND TOTAL: \$171,960**

Additional fees may be required for further DC Appeal re Guardian's fees and for litigation to recover expenses.

## **APPENDIX F: Mollie's Life and Financial Affairs Today**

### **Her health and mental status**

Mollie recently celebrated her 88<sup>th</sup> birthday.

Her health is stable and although she is wheelchair-bound despite physical therapy, she has no serious physical ailments requiring frequent medical visits. She is under the care of a doctor with a geriatric subspecialty.

Mollie's dementia is far worse than it had been before her traumatic forced incarceration that ended a little over a year ago. However, although she is confused and the illness is progressive, she has not appreciably deteriorated in the past year, since being in New York.

### **Her life**

Mollie is living in the Manhattan apartment that she purchased and furnished in 1988 just for this purpose, to be near and be cared for by her family. She has 24-hour homecare. The attendants (one 5 days a week, the other 2 days a week) have been with her for a year and she is used to them.

Mollie is anything but independent, yet she believes she is in total control and does everything herself.

Mollie sees her sister, who lives in the same building, every day and spends Sunday afternoons in that sister's apartment. She sees her other sister, who lives nearby, at least twice a week. She also has 5-7 visits a week from her nieces and their husbands.

Mollie enjoys eating out with her aide. In good weather, they sometimes sit in nearby Central Park. Mollie also attends a social day program 5 days a week, where she participates in a variety of activities for seniors like herself and exercises her mind.

### **Her care**

The director and staff of the social day program and Mollie's doctors state that she is thriving and is in the best hands, with the appropriate level of homecare and very attentive and excellent hands-on care and supervision by her family.

All care for the past year, including living arrangements, clothing purchases, homecare, medical appointments, the social day program, and special transportation services, has been implemented by her niece, Jane Pollack, who in essence has been her "guardian", even while someone else officially but needlessly and illegitimately held the title. (He was a guardian in name only and was not involved in any aspect of the care.)

### **Her finances**

Bills and taxes had been and continue to be handled by Mollie's sister, who is her designated Co-Trustee. This sister, in essence, has been her "conservator", even while someone else officially but needlessly and illegitimately held the title. (His only accomplishment as conservator was to divert close to \$133,000 away from the Trust into a "fiduciary" account. His appointment only served to waste and dissipate a lot these funds and he is hoping to keep a good chunk of the remainder as his fee "for services rendered as guardian and conservator.")

## **APPENDIX G: Key Issues to Consider**

- **Jurisdiction**

Families are often physically separate due to college, marriage, jobs, and retirement. Nowadays, there may be more than one possible and reasonable jurisdiction for Guardianship, if an Intervention Proceeding is to be held. One Court should not force someone to be held captive by its jurisdiction if another jurisdiction makes more sense or is better for the Subject. If the likely caretaker is in another jurisdiction and it would be more feasible for the Subject to be there as well, or if the Subject expressed a desire to relocate if care is needed, then the Court should make every effort to transfer the case or dismiss the case in deference to another jurisdiction's Court. Judges should not be power-hungry or territorial in making such determinations. An individual in need of protection should be assumed to be afforded a proper assessment and decision by another Judge.

- **Hidden voiceless victims: How many? How can we stop this?**

How can anyone know how many victims there are of abuses and injustice in the Guardianship system? These individuals, who are likely to be limited by nature of their physical and mental frailty to begin with, have no way of speaking up, making themselves and their plight visible, or seeking redress or help out of the situation.

These individuals are stripped of their rights. They are not even allowed to sign their own names. Almost always, especially if a Court-appointed stranger-Guardian is in charge, the individual will be locked away, out of the public eye and without access to the outside world, unable to get the word out, confined to a nursing home. (That's the easiest way of hands-free management of a Ward's living arrangements and personal and medical care, with others responsible for the details and implementation.) If the Guardian visits and the Ward wants to file an action in Court to remove him or file an Appeal, and tells this to the Guardian, what will happen to the request? If not going through the Guardian, then through whom? The individual may not even know that he has the right to request that the Court consider removal of a Guardian or Conservator and will most definitely not know how to go about it. The person certainly couldn't file himself. He would need a lawyer. How would he get one? Big Brother, the Guardian who wants to preserve his own job, for which he gets paid, is the Ward's only spokesperson. **Perhaps something can be done about this.** It is unlikely that putting an ombudsman in each nursing home would solve the problem, because the nursing home will have its own interest in mind, namely keeping its beds full. Maybe some centralized examiner or ombudsman needs to travel to all Wards, wherever they may be, and interview them outside of the presence of their Guardians.

Another approach to seek out victims of inappropriate Guardianships, and perhaps a better one, would be for an audit of Court records by an independent agency, meaning an agency independent of the Court, independent of the Petitioner and Guardian, and independent of APS. The auditor may have to be an attorney in order to insure that the law has been followed to the letter. It would be akin to someone searching the record to see if there are any grounds for appeal due to abuse of discretion, legal errors, or ineffective counsel. (If anyone reads the transcripts of the Mollie Orshansky hearings, the abuses and errors are astoundingly evident. In other cases, they may exist but be more subtle and require a trained mind.)

What about friends and family? Certainly, if they know about erroneous judgments or railroading of the Subject, that information could help pinpoint cases to review. (However, we caution that a review should really be done of all cases.) In any event, how many friends and family members will be willing to put up a fight in Court, at their own out-of-pocket expense of perhaps \$20,000 - \$50,000 to intervene? Regardless of how much they may love the victimized individual and feel sorry for them, they may be unwilling, or at least very likely to be unable to afford, to mount an appeal and a rescue.

Mollie, as victim, is just the tip of the iceberg. How broad and how deep might it be? How many helpless souls were broken and lives taken away by abuses in the Guardianship process? How many are yet to follow?

## **APPENDIX H**

### **Recommended Safeguards in Guardianship “Interventions”**

#### **Adult Protective Services**

APS can play an invaluable role in investigating self-neglect, neglect or abuse by others and financial exploitation and in assessing the condition of the frail or mentally incapacitated elderly and taking steps to improve the situation and arrange for needed care and assistance. However, they must be mindful of the rights of the elderly to reject help and decide how they want to live their lives. A fine line exists between the point where help and generally-recognized improved living conditions should be forced on someone or they must be allowed to make their own choices, whether one approves of those choices or not, just as a fine line exists between when medical procedures can be forced on any individual and when that person has a right to say no, and even between when a homeless person can be forced into a shelter or must be allowed to remain on the street if he so chooses. One size does not fit all, and living conditions do not have to be ideal, merely sufficient. Independence and decision-making must not be wrested from individuals unless absolutely necessary.

Once brought in on a case, if there is some action that legitimately rises above the fine line threshold and must be taken to protect the Subject, then APS should be held accountable for taking appropriate action.

Although they may have broad powers, APS must also be held accountable for providing notification and information to the Subject and the Subject's family at every step of the way. APS is not the secret police. Their powers are not, nor should they be, unlimited, and they must be prevented from ruining lives out of an abuse of power or a misconception of the extent of their power; also from making assertions that are not facts and have no evidentiary grounding, that are then automatically viewed as the truth by attorneys, judges, evaluators, etc. just because the assertions come from APS.

A Subject has the right to know who the APS caseworkers are and that they are from APS, who called them in, what they are investigating, and their intent and plans. If action is contemplated by APS, the Subject also has the right to know about this and when the action would be taken. Requests for information and notification of actions should be both verbal and in writing and should include deadlines for providing APS with information or implementing steps that could avoid the need for invasive actions by APS. All requests for information and notifications should also be provided to known family members, whom APS should be required to seek out, even if they live far away or are perceived to be disinterested, adverse to APS's intervention, or neglectful.

Following are specific requirements that should be imposed on APS, in order to protect the rights of the frail or incapacitated elderly and their families. It is entirely possible that through these additional requirements imposed on APS,

beneficial outcomes may in many cases be achieved to improve dangerous situations and arrive at resolutions that might avoid Guardianship Intervention Proceedings, which should always only be the last recourse.

1. APS must tell the Subject, verbally and in writing, why they have come, who called them in, and what they will be investigating.
2. APS must attempt to identify and locate family members and maintain contact with them as well, verbally and in writing, throughout the process, even if the family is outside of the geographical jurisdiction.
3. APS must advise the family, verbally and in writing, why they were brought in, who called them in, and what they will be investigating.
4. Regarding any information that APS requests, the request must be verbal and in writing, with a date certain deadline. The request must go to the Subject and family and must include the purpose of the request, the intended use of the information provided, and the authority by which APS is requesting the information. It is not good enough to say that "APS has broad powers" and "needs to know everything about the individual; personal and family history, education, employment, financial, medical." If the requested information is not provided, can it be subpoenaed or obtained via a warrant? Why is each requested piece of information needed? To what use will it be put? What will the difference be with or without the specific information sought?
5. If the requested information is not provided by the deadline, verbal and written notification must be provided by APS to the Subject and the family, giving them an opportunity to meet one more deadline or perhaps to indicate that they did send the information.
6. APS should seek to determine whether the Subject has executed a Power of Attorney for Health Care, Health Care Proxy or similar document, a Living Will, and a general Power of Attorney, and if the Subject has a Trust and a Will. The appointees of the Subject can be indicative of who the Subject might want to provide assistance to him in the present situation.
7. The family should be given the opportunity to describe any actions they had taken in the past, or are undertaking at present, to assist the Subject. Such description could be verbal but should be documented by the family and provided to APS in writing, as well, with a copy to the Subject.
8. If APS believes there may be or may have been financial exploitation or physical or emotional abuse or neglect, they must advise the family of their suspicions. However, ultimately there must be factual evidence to support such conclusions or else the suspicion or intuition must not be mentioned, as ungrounded defamation and innuendo, to anyone, nor included in any reports nor in any testimony in order to try to influence a Petitioner to file, or to influence a Judge or Evaluator.
9. If APS determines that they will implement care as a course of action, such as to bring in homecare or Meals on Wheels, they must advise the Subject and family of this, verbally and in writing.
10. If APS changes the plan, for whatever reason, and will implement different care, not implement care, or take a different action, they must notify the

Subject and family, verbally and in writing, of the change in plans, the reason for the change, and what the new plan is.

11. If APS determines that no effective plan can be implemented successfully to improve the situation sufficiently to the extent that filing for Intervention and Guardianship can be avoided, they must notify the Subject and the family, verbally and in writing, of their determination and reasons. A deadline should be given for implementation of specified improvements, past which the more invasive action, spelled out, will be taken. Such a final warning could potentially shock the Subject into agreeing to accept help, or prompt the family into implementing care, or could spur the family to file for Guardianship to protect the Subject from a proceeding being filed by a stranger, such as by a hospital. (Family may be reluctant to do this to their loved one unless their hand is forced.)
12. APS must never dump a Subject in order to force him or her into a Guardianship proceeding without zealously exploring other more benign and less invasive alternatives.
13. APS must not make a decision to dump a Subject and force him or her into a Guardianship proceeding based on the knowledge that the Subject has significant assets and can well afford to pay Court costs and Attorney's, Examiner's, Visitor's/Evaluator's, Guardian ad litem's, and Guardian's fees. The Subject's net worth must not have a bearing on whether an invasive action is or is not undertaken.
14. If APS brings a Subject to a hospital or other institution to institute an Intervention Proceeding, APS must provide evidence to the Petitioner before the Petition is filed.
15. Individual APS caseworkers, as well as their superiors and the APS agency, must all be held accountable for their work and their actions and liable if they do not follow the requirements pertaining to information and notification.
16. APS caseworkers must only cite facts based on evidence and must not cite suspicions or opinions without a factual basis.

### **Hospitals and other institutions, and Attorneys representing them, as Petitioners for Intervention Proceedings**

1. Hospitals and other institutions into which allegedly incapacitated persons (AIPs) or IPs are placed "for custodial reasons, pending a hearing in an Intervention Proceeding," must not serve as mills for "granny-snatching" nor for offloading of APS cases without due cause and documentation. A representation by APS must be grounded in material facts that are presented up front, including a file showing all proper notifications, and not just to be furnished at a later point, when they may not materialize.
2. The civil, constitutional and legal rights and legitimate interests of the AIP or IP must be honored. AIPs and IPs must not be involuntarily incarcerated for custodial reasons pending a hearing, as if they were being held without bail pending trial. Commitment Orders or Protective Orders may be sought, but only for cause, which must be based on facts and not on innuendo, opinion or suspicion

3. If a Petition for Intervention is to be or has been filed, that fact should not preclude the release of the AIP or IP unless detailed reasons for endangerment exist and can be provided. If a Durable Power of Attorney for Health Care or a similar device of another jurisdiction exists, and the Attorney-in-Fact or Health Care Agent is willing to take care of the individual and requests that the individual be released into his or her care, and the individual is in agreement, and the individual is not in need of protection from said agent due to harm or abuse, of which factual evidence exists, then the discharge from the institution into the hands of the agent must take place.
4. Even if an Attorney-in-Fact or Health Care Agent resides in a different jurisdiction and there is reason to believe that the AIP or IP might be removed from the present jurisdiction if discharged into the agent's care, the requested discharge must still take place.
5. The AIP or IP who is in a hospital or other institution must not be physically restrained or heavily sedated unless this is medically warranted. The determination must be made on the side of not using restraints, sedatives, tranquilizers or antipsychotic drugs to quiet the person and make him or her less combative and more submissive if there is any doubt.
6. Official visits and meetings of attorneys, a Guardian ad litem, a Visitor or Evaluator, and an Examiner with the Subject of an Intervention Proceeding must occur while the Subject is not under heavy tranquilizers, sedatives, or antipsychotic drugs and the Subject must be free of any medication that renders him or her drowsy or with reduced mental acuity, so that the Subject can understand and participate in the discussion to the maximum extent possible.
7. The Subject must not be asked to sign any document turning over powers or assets, agreeing to representation, or agreeing to having had a meeting or discussion with an attorney or Guardian ad litem if he is under heavy tranquilizers, sedatives, or antipsychotic drugs or any other medication that renders him or her drowsy or with reduced mental acuity.
8. While hospitalized or institutionalized, the Subject may not be denied any test, medication, examination or treatment that can reasonably be provided somewhere within the overall general facility, if the test, medication, examination or treatment would be of benefit to someone who was not a resident or inpatient of the facility. For example, pneumonia vaccine may not be withheld because it is not normally given to inpatients, while forcing the Subject to be an inpatient for custodial reasons, to await a hearing.
9. Every effort must be made to protect the Subject who is held in a hospital or institution for custodial reasons, pending a hearing, from exposure to infectious agents, the development of pressure sores, the onset or worsening of incontinence due to catheterization, diapering, or infrequent change of diapers, other kinds of neglect or negligence, and mental decline due to traumatization, forced residence and disorientation.
10. If the hospital or institution is the Petitioner in a Guardianship proceeding, it must not have anything to gain, financially, from the outcome.

11. A hospital or other institution may not bill the Subject for his or her stay, for custodial purposes, pending a hearing. This provision is necessary to ensure that hospitals and other institutions do not file as Petitioners, or refuse to discharge the Subject, merely to pay for vacant beds or make filing Petitions a profitable enterprise.

### **Court-appointed attorney to represent the Subject of an Intervention Proceeding**

1. Must never be permitted to be appointed as a Temporary, Emergency, General or Permanent Guardian, Conservator, or Trustee.
2. Must be selected in strict descending order from a list of approved attorneys who are candidates for this role.
3. Must meet stringent requirements, such as specific training and a test for attorneys to represent the Subject of an Intervention Proceeding, and preferably have an active practice in Estate Planning and Elder Law. (Other than having passed the Bar exam, attorneys in other areas of practice, such as Real Estate, Commercial Litigation, Personal Injury, Malpractice, and Computer Law, have no training that qualifies them to effectively perform the required functions of a Court-appointed attorney and achieve justice and good results for their client, the Subject.)
4. Must have, and must have previously had, no personal or work affiliation or business with any of the parties in the Intervention Proceeding, including but not limited to the Petitioner, the attorney for the Petitioner, the Guardian ad litem, the Visitor or Evaluator, the Examiner, APS or the APS caseworkers associated with this case, or the proposed or eventually appointed Guardian or Conservator.
5. Must have no conflict of interest with the Subject (the client).
6. Must personally represent the Subject. Must not delegate the representation to colleagues and other members of his or her law firm or hire another attorney to perform the functions.
7. Must meet with the Subject on multiple occasions and identify himself as the Subject's Court-appointed attorney, advise that a Petition for Intervention has been filed and what that is, and state his role as the Subject's attorney.
8. Must advise the Subject that he will be submitting a request for compensation at a later point, and the bill will be based on the time spent on the case.
9. Must provide the Subject with his telephone number and ensure that the number and the attorney are readily available to the Subject.
10. Must inquire of the Subject if he has another attorney whom he would prefer to represent him. If so, must contact that attorney to discuss whether that attorney would be interested in representing the Subject. Either way, must advise the Judge regarding the existence of the other attorney. (An attorney

who is familiar with the Subject and past dealings and family history might be preferable to a stranger.)

11. Must explain to the Subject the circumstances of the filing for Intervention, who the parties are, and why the Petition had been filed.
12. Must actively and thoroughly research the Subject's legitimate interests, including identifying, validating, and entering into evidence any Powers of Attorney, Proxies, Trust Agreements, or other legal instruments executed by the Subject.
13. Must assess the likely outcome and discuss it with the Subject.
14. Must ascertain from the Subject how he or she wishes to proceed.
15. Must ask the Subject if there is anyone he or she would choose to be the Guardian or Conservator, and why.
16. Must attempt to locate the candidate requested by the Subject to determine whether they would be interested in the role. Must investigate the background, relationship and history.
17. Must identify and meet or at least converse with family members of the Subject, even if they reside in another jurisdiction, to determine whether they could effectively be proposed to be the Guardian/Conservator.
18. Must make every attempt to devise a solution, agreeable to the Subject, which would be less invasive and which might cure the situation that prompted the need for intervention. For example, the Subject might agree to accept homecare and might agree to unofficial supervision by a friend or relative or to hire a Care Manager to arrange for and manage a suitable level of care.
19. If the Subject does not appear to understand, must ask the Court to appoint a qualified and independent Guardian ad litem, with no affiliations with any of the parties or attorneys.
20. If an interim or Temporary Guardian is appointed, the attorney for the Subject must continue to directly deal with and represent the Subject and not the Temporary or Permanent Guardian in his or her stead.
21. The attorney for the Subject must advise his client and explain all events in the proceeding, including the findings of fact, conclusions, and orders issued.
22. The attorney for the Subject must advise his client and explain the right to file a Motion for Stay Pending Appeal and the right to appeal. The cost of an appeal and likely timeframe before it was heard and ruled upon must also be discussed, as well as the odds of success.
23. The attorney for the Subject must advise his client each time any party submits a Petition for Award of Fees and must zealously and actively review each such submission and file whatever objections are suitable and in his client's best interests. He should try to keep any judgments for payment from his client's funds to a minimum.
24. The Subject must also be advised when his own attorney's Petition for Fees is filed and must be given a reasonable opportunity to respond to the Court and object if he so desires. (Question: Who does this for the Subject? His attorney cannot write the objection lest it be less than effective.)

25. The attorney must ensure that the Subject is not heavily drugged to the extent that his understanding of what the attorney is telling him, and his capacity to comprehend what he is being told and to respond and be able to effectively participate in the planning for his case, is not compromised.
26. A checklist with all points to be covered by the attorney with his client, at the initial meeting or meetings, as detailed above, including the introduction, reason why appointed, reason for Intervention and fact that there will be a hearing in Court, asking if the client has another attorney whom he would prefer to represent him, describing the likely outcome, discussing how client wants to proceed, asking the client about family, plans, powers of attorney, existence of a Trust or joint account, etc., must be completed by the attorney and signed by both the attorney and the client, in front of impartial witnesses, at the time the discussions actually took place, so that the client would have the best chance of remembering that they had taken place and understands what he's signing. The lawyer must also complete, and sign under oath, a checklist that states that he made all of the contacts and inquiries, described above, that were required of him. The checklists must be presented in Court at the hearing and become part of the record.

### **Judge**

- The Judge has the ultimate responsibility for ensuring that the letter and spirit of the law are followed.
- The Judge must determine and ensure that there is no illegitimate affiliation between any of the parties, including the Petitioner, the attorneys, and the Guardian ad litem, Visitor/Evaluator, and Examiner. They must be independent.
- The Judge must determine and ensure that appointees such as a Guardian ad litem, Visitor/Evaluator, and Examiner are experienced and qualified to perform in their roles, and that expert testimony is brought in, as needed, so that inexperienced opinions are not given undue weight.
- The Judge must ensure that the Subject is enabled to participate in the proceeding to the fullest extent possible and is heard and not silenced, and that the Subject is viewed as a person with rights which must be protected by the Judge and not allowed to be minimized, disregarded, or violated.
- The Court-appointed attorney must be selected sequentially from the list.
- The Court-appointed attorney must never be appointed the Temporary, Emergency, General or Permanent Guardian, Conservator or Trustee.
- The Subject must be given the opportunity to have an attorney of his choosing if he indicated this preference instead of having a Court-appointed attorney.
- The Judge must appoint a Guardian ad litem if one is needed, to assist the Subject in comprehending the situation and in determining his preferences and best interests.

- The Judge must ensure that undue credit is not given to the testimony of APS, if they are involved, merely by virtue of the fact that they are APS caseworkers, and must require that their reports be based on material evidence and fact and not suspicion, innuendo, intuition, prejudice against the Subject or the family, vengeance, frustration, ego, or the like.
- The Judge is responsible for keeping a watchful eye to see that the Court-appointed attorney provides effective counsel and zealously and competently represents the Subject and that the required checklists with proper remarks and signatures are on file, indicating that the Court-appointed attorney performed all of his required functions.
- There should never be a rush to judgment or an a priori decision.
- “Favorites” of the Judge must not be given undue weight or credence.
- The Subject must not be subjected to any Court orders restricting his rights and appointing persons to have control over him and his assets, who can make far-reaching decisions as to where and how he resides, what treatment he receives or is denied, and who will be paid from the Subject’s funds, which might deplete them, unless such orders and appointments are entirely necessary. The Judge should always seek to arrive at less restrictive solutions, if possible, and should inquire as to why they would not suffice. (For example, allow homecare; accept assistance; hire a Care Manager.) Any solution which, had it been in place, would have avoided the need for Intervention, should be viewed as not too late to implement if it could be done and the Subject was now willing to comply. The Judge could keep the case open and call for status hearings one, two and three months later to ensure that the solutions were implemented and remained in effect and were working satisfactorily. The case could then eventually be dismissed.
- Unless there is actual evidence of abuse or financial exploitation by the family or by the designee of the Subject in a Power of Attorney, Proxy, or Trust Agreement, the Judge should seek to honor the legal designees of the Subject and give preference to them and then to family members. Even if the designees or family reside in another jurisdiction and would likely relocate the Subject to that jurisdiction, that should not be a deterrent to selecting them and giving them preference. Even if family from outside of the jurisdiction had provided little or no assistance to the Subject in the past, that might reasonably be excusable and understandable based on geographic distance, inconvenience, lack or knowledge of the seriousness of the situation, the Subject’s unwillingness to accept help, and other reasons. The Court should always view with favor the willingness of family to step up to the plate and assist the Subject in his time of need, and the likely best care of the Subject that would occur at the hands of the family rather than a Court-appointed stranger whose actions are performed solely for remuneration.
- If there is any affiliation or conflict that the Judge has with any of the parties, witnesses or institutions, the Judge should recuse himself, even if the conflict occurs while the case is in progress.

### **Court-appointed Guardians selected from a list**

- Must never start out as the Petitioner or Court-appointed Attorney.
- Preferable that the list consist of experienced and skilled Care Managers rather than attorneys. An attorney (even an Elder Law attorney) has no special expertise regarding care options, management of homecare attendants, social activities and programs, paratransit arrangements, selection of a nursing home, etc.
- If attorneys, should undergo guardianship training by a Care Manager.
- Must try to come up with a care plan that provides the most independence and closest environment to the previous home and social environment as is feasible and that finances allow. For example, should try to have the Ward cared for in his own home and familiar environment. Should try to provide an environment with outside activities, such as shopping, eating in restaurants, and attending a senior center or special adult day program. Assisted living should be considered. Placement in a nursing home should be the last solution rather than the first.

### **Court-appointed Conservators selected from a list**

- Must never start out as the Petitioner or Court-appointed Attorney.
- Preferable that the list consist of accountants rather than attorneys. An attorney (even an Elder Law attorney) has no special expertise regarding tax preparation or producing an accounting.